Supreme Court, U.S.
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NO. 06-581

In The
Supreme Court Of The United States

ALLEGRETTI & COMPANY,

Petitioner,

vs.

COUNTY OF IMPERIAL, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The Court of Appeal of the State of California,
Fourth Appellate District, Division One

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Imperial County could not even draft the first two pages of its Brief in Opposition without demonstrating tellingly the need for this Court's intervention. First, it refuses to deal with the facts shown in the opinions below and makes up other facts that are easier to deal with. Second, it can respond to the Questions Presented only by ignoring the Questions Presented in the Petition and making up its own straw creatures with which to deal. Neither ploy should detract from the need for this Court to grant certiorari to settle important issues that are continuing to spread confusion in the lower courts.

On a factual level, the County is simply wrong in asserting that Allegretti sought "to install a new groundwater well" and then "declined to cooperate in the environmental review . . ." (Br. in Opp. 1.) That is not this case. It was not a new well, but reactivation of an existing well. (Pet. App. 44.) And Allegretti did not "decline" cooperation, but provided voluminous information. On the first appeal of this matter, the Court of Appeal reversed a judgment in the County's favor, "agree[ing] with Allegretti" (Pet. App. 38) that the County lacked jurisdiction to regulate the amount of water removed from the aquifer, but giving the County a chance on remand to provide additional evidence – including, presumably, environmental evidence – that would show otherwise (Pet. App. 42). On remand, the County stipulated that it had no additional statutes, regulations, or other evidence to present.

On an issues level, the County apparently believes that if it ignores – at this procedural stage – the importance

of the water rights underlying this Petition then the issues will magically vanish. The County knows better – as the record below amply demonstrates. As shown by the numerous letters sent to the California Court of Appeal urging publication of the opinion *for the precise purpose of developing a line of authority that would conflict with existing published authority* – requests that came from organizations across the country, including the Planning and Conservation League, the Natural Resources Defense Council, and the Georgetown Environmental Policy Institute – this case raises issues of serious national legal import. Those issues merit vetting in this Court.

I

THE COUNTY'S BRIEF IN OPPOSITION CONFIRMS THE EXISTING CONFLICT ABOUT PHYSICAL TAKING ANALYSIS OF WATER ACCESS CASES

The Petition shows the conflicting approaches to analyzing government approaches to abrogating or interfering with private water rights. (See Pet. 6-9; see also Brief Amicus Curiae of Pacific Legal Foundation.) Different analytical models have evolved:

> — Item: Because the right of access to flowing water is in constant flux (i.e., the water that is there today will be gone tomorrow), interference with the right of access is more properly analyzed as a physical taking rather than a regulatory taking. (*Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 [2001].)

> — Item: Impoundment of water, so that those who are otherwise entitled to it cannot reach it, is a physical taking. (*International Paper Co. v. United States*, 282 U.S. 399 [1931]; *Dugan v. Rank*, 372 U.S. 609 [1963].)
>
> — Item: Action taken in the guise of regulation that in fact abrogates property owners' right of access to water beneath their own land can never be viewed as a physical taking. (The case that is the subject of this Petition. [Pet. App. 1].)

In response, the County ignores the problem, noting only that physical takings and regulatory takings are different. (Br. in Opp. 5.) So stipulated. So what? The question is how to analyze water rights cases and deal with the growing legal confusion evidenced by the lower court decisions and commentary (both legal and popular) collected in the Petition. On that issue, the County is silent.

The County's only noteworthy contribution is its citation of *another conflicting case*. The County calls the Court's attention to *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504 (2005) which chose expressly to disagree with the decision in *Tulare Lake*. (Br. in Opp. 6, n. 4.) Contrary to the County's assertion, *Klamath* did not "neutralize[]" *Tulare Lake*, it only heightened the conflict in published case law.

Certiorari is needed to resolve these conflicts.

II

THE COUNTY'S BRIEF IN OPPOSITION FAILS TO DEAL WITH THE SUBSTANTIAL REGULATORY TAKING ISSUES PRESENTED BY THE PETITION

The Petition amply showed the confusion that this Court's regulatory taking decisions is still causing both in lower judicial and academic circles. Despite the number of cases reciting general precepts, there are few concrete rules to help regulators, property owners and courts analyze real cases and decide how to prove – or disprove – that a regulatory taking has occurred.

When key terms in this Court's regulatory taking jurisprudence – terms like "economically viable [or productive or beneficial] use" and "investment-backed expectations" – terms that are at the heart of issues that must be examined in such cases, are left in a state of uncertainty then what results is anarchy.

The level of uncertainty was shown in the materials quoted in the Petition from both judicial opinions and scholarly commentaries. (Pet. 5-6, 11-18.) As shown there, others have concluded the existing case law results in a "virtually standardless inquiry," an "elusive" definition with "uncertain" meaning, a question whether key terms have "any intrinsic meaning at all," raising "one of the trickiest and slipperiest parts of land use law," leaving government regulators to act "according to gut feeling in the individual case, instead of by rule of law."

That is not an acceptable situation.

The County's response? Silence. The County blandly asserts that the California courts "followed established principles" (Br. in Opp. 6, 7) without examining those "established principles" in light of the criticisms tartly leveled against their exposition by most of those who have tried to make sense of this field of the law.

The problem is not so much with the "established principles" as it is with the near total absence of guidance on how to apply them. That is where the case at bench comes in. For example, the County criticizes the evidence presented by Allegretti to prove its investment-backed expectations for use of the land. (Br. in Opp. 7.) What the Petition seeks is guidance from this Court – to date, there has been none, either from this Court or lower courts – as to the kind of proof that is needed to establish that criterion. Allegretti believes that sufficient evidence was presented. The County disagrees. That shows how this case can be useful in helping this Court help the lower courts and litigants understand the meaning of the general phrases that predominate in its regulatory taking cases and which lower courts and litigants have not been able to apply.

The law of regulatory takings needs this Court's guidance. Allegretti's purchase and anticipated use of 2,400 acres of farm land in an agricultural area – and overlying its own underground water supply – provides an apt subject for examination and explication.

CONCLUSION

This case presents serious constitutional issues involving both water law and takings law. The cases in which they arise have increased in recent years and promise to continue doing so. As plainly stated by the State and National organizations that succeeded in obtaining publication of the opinion below, there are numerous cases either pending or contemplated where the clash between this case and *Tulare Lake* will be presented – with a deliberate eye to asking the courts to choose one or the other. It is preferable for the Court to deal with the issue now, when it is plainly presented, rather than allow confusion to proliferate.

Petitioner prays that Certiorari be granted.

Respectfully submitted,

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